

THE PARADOX OF THE IMAGES OF LAW AND THEIR CRITIQUE IN OUR JURISPRUDENCE

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Introduction

The law is a Paradox. This article exams the paradox of the images of law and a criticism of same in our jurisprudence. An attempt shall be made to define law, make an outline of the images of law and take a cursory look at the celebration of law. An assessment shall then be made of the critique of law and whether law is an unfilled promise, not forgetting controversial issues like hyperlexis-too much law, with the conclusion that law is an unanswerable question to difficult puzzle, riddle. It is infact an enigma and a quandary, for example, it is the same law that talks about hearing one party in a case that still insist on hearing the other party under the principle of fair hearing i.e. **audi alteram patem**.

Definitions

Law

What is law? It is a most difficult question to answer. Why? It is all-embracing in scope and dimension that it is difficult, therefore not easy, if not impossible to evolve a straight-forward definition for it.

Secondly, the more an attempt is made at defining law, the more other problems deserving further solutions would arise. As a result of this apparent impasse Philosophers, Jurists and Legal Scholars have a adopted a more viable method of describing what law does in a given society, rather than embarking on a fruitless exercise at definition¹. Law is however the body of rules and standards issued by the legislative body, or to be applied by courts and similar

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¹ T.O. Dada. General Principles of Law, Dada and Co, Lagos, 2006, P. 1.

authorities². It is the regime that orders human activities and relations through systematic application of the force of politically organized society.

Law is not just an abstraction or an intellectual exercise. It shapes not just the character of our democracy, but the circumstances of our daily life³.

The life of law has not been logic, it has been experience⁴. Law is any embodiment of life. A legal Historian, *Harold J. Berman* once said in *Kitty Calavita* in 2010, a child says ‘it is my toy’, that is property law. A child says you promised me ‘that is contract law’. A child says ‘he hit me first’ that is criminal law. A child says ‘Daddy says I could’ that is Constitutional law. There is hardly a time in our lives before we develop some dim consciousness of law.

*Salmond*⁵ has asked the question, why so much time and energy should be devoted to the question, what is law? Another jurist⁶ also contends that law has been flowed in an endeavour to provide a universally accepted definition of law. To *Thurman Arnold*⁷, law can never be defined.

Law is all over, law is everywhere. Law is an enduring presence in our lives. We encounter law every day in matters like divorce, dispute, landlord/tenants, traffic cases, on the radio, television, Newspapers, websites, important court decisions, proposed new

² Blacks Law Dictionary, 7th Edition, edited by Bryan A. Garner, St. Paul Minn, 1999, p. 889.

³ President Barrack Obama, Former President, U S A, Hulse, 2010.

⁴ Oliver Wendel Holmes, Jnr, 1881.

⁵ Suleiman Ikpechukwu Oji: Introduction to Legal Method, New Ed., Ibadan, Ababa Press, 2011, P. 1.

⁶ Lloyds: Introduction to Jurisprudence, 5th Ed., (London, Stevens and Sons, 1985) P. 52.

⁷ Thurman Arnold: The Symbols of Government. (1935) pp. 36 – 37.

legislations, alleged violations of international law, polls of public opinion concerning ongoing legal controversies, and so on.

It can therefore be perused that law varies with the society and with the cultural traits of the people as was held in the case of *Mohammed v. Knott*⁸. Law is therefore multi-faceted. From Plato, Aristotle, Cicero, Blackstone, Pollock, Holmes, through Austin's Command Theory, Kelsenian Pure Theory of Law and Aquinas Divine Law Theory, no acceptable meaning of law had emerged depending on the definer's focus or interest. This obvious fact notwithstanding, law has always been the product of the society. In *Aoko v. Fagbemi*⁹ Law is useful as a means of stimulating economic development.

Parado

The Living Webster Encyclopedic Dictionary of the English Language¹⁰ defines paradox as a statement or proposition seemingly-self contradictory or absurd, and yet explicable as expressing a truth.

Images

The Living Webster Encyclopedic Dictionary of the English Language¹¹ defines an image as a likeness, apparition, an act of imitating which forms a counterpart or likeness of something else; it is an embodiment, a semblance, memory or imagination.

Making sense of law

There is no single framework of understanding law, no ones perspective on how and no core thesis about law is adopted here. Law is rather viewed as many-hued, multifaceted, often complex

⁸ (1969) 1 QB, 1.

⁹ (1961) 1 ALL NLR, 400.

¹⁰ Edited by Noah Webster, The English Language Institute of America, Inc. (1975), Illinois.

¹¹ *Supra*, at p. 477.

and contradictory. Law is everywhere, law matters and law does not matter. It swims, it flies and it dives. It also takes cover. Law is beneficial and law is harmful. Some dimensions of law are very visible to us. Other dimensions are quite invisible and quite incomprehensible. It repairs and destroys.

Law is studied in different ways. Some literature on law is purely descriptive and prescriptive or doctrinal. The Positivist tradition looks to the Natural sciences for its model. The Humanistic tradition looks to the Humanities - philosophy, history and literature for its model. Each approach has its limitations. However, everyone evaluates their images and understanding of law through an ideological prism. Beliefs about law vary over time.

Images of Law

A fundamental tension exists between the idealized image of law and what we may discover about the realities of law. In our time, it is difficult to sustain an image of law as a source of perfect order, impartiality and justice. A minority views perception of law will not be the same with the majority group. In the recent era, wrong doing on all levels of lawmaking and law enforcement has been recently exposed.

It is possible to sustain a strong allegiance to the rule of law without being naïve about the laws biases, abuses and limitations. Law is indeed all over, law is everywhere on the relationship between law and society, in one view, law is autonomous, in another view law and society are homologous. A third view is that law and society are best thought of in interactive terms. A Judge in Court sees law from various perspectives depending on the case.

In *Scenconsult v. Secondary Ukey*¹², a case bothering on Service of Processes outside jurisdiction where the Defendant took steps to reply, whether the said service is incompetent, and case liable to be

¹² (1981) 1SC, 6.

struck out. The Court said yes here, whereas, the same Supreme Court overruled itself in *Oduaa Investment Ltd. v. Talabi*¹³ and held that if the Defendant has taken steps by replying i.e., filing a defence, the Court will take as the Defendant joining issues with the Claimant and the case will not be struck out.

In *Unaegbu v. Unaegbu*¹⁴, a matter which touched on verifying Affidavit to accompany the Petition in Matrimonial Causes without separate heading. The same Court of Appeal overruled itself in *Oduote v. Oduote*¹⁵ where it held that even though the Affidavit is separate from the petition, the action is not incompetent.

It is pertinent to note that a Court delivers majority, Minority or dissenting Judgment. Even when the majority decision is the *ratio decidendi*, it does not make the minority decision irrelevant. In a nut shell, the *ratio decidendi* is as important as the *Obiter Dictum*. This Obiter Dictum may in another case form the ratio.

A Court of co-ordinate jurisdiction gives a persuasive judgment and at times overrules itself. No matter how relevant or intelligent a Judge's decision maybe, that court is bound to follow the decision of a superior court, under the doctrine of *Stare Decesis*. Appellate Courts like Court of Appeal and Supreme Court that a classified as superior Courts of Record also overrules themselves. This is because the law has many images.

Commencing a suit under a wrong Law or Procedure, and failure to indicate the said Rule does not deny the Applicant remedy. This is no longer taken seriously as long as it does not lead to miscarriage of justice. The Law is not a Slave to technicalities but goes for

¹³ (1997) 7 SCNJ, 600

¹⁴ (2004) 11 NWLR, (Pt. 884) 332.

¹⁵ (1971) NMLR, 228.

substantial justice. This was the basis of the decision in *Saleh v. Monguno*¹⁶, *Bello v. A.G. Oyo State*¹⁷, *Falobi v. Falobi*¹⁸.

Once a party is entitled to a remedy, application of wrong law will not deprive him the benefit of such remedy. This much was decided in *Edewor & Ors. v. Uwaegba & Ors*¹⁹. It is equally trite that bringing a wrong application does not invalidate a case in Court just as failure to indicate the Rule or Order sought, as was held in *Merchant Bank Nig. Ltd. v. Feteco Nig. Ltd*²⁰.

The celebration of laws

Law is celebrated thus:

- a. There is the conventional view that law is not only something ‘good’ in itself, it is the principal means for ensuring that people can enjoy all the good things of life.
- b. Law makes freedom possible along with the choices and rights associated with living in a free society.
- c. The rule of law is universally embraced by all societies aspiring to any orderly and productive existence.
- d. Law is rooted in democratic consensus as Nigeria and the U S A where democracy is in vogue.
- e. Law promotes justice and fairness.
- f. In the conventional view, law fulfils some essential functions, it does not only maintain order, and it makes order possible.
- g. Law restores what has been lost to the Plaintiff and victims; it allocates responsibilities and costs, and imposes appropriate penalties on guilty and negligent parties.
- h. In the positive view, law serves as the key element in the fostering and maintenance of a democratic political system, it provides a fundamental constraint in the exercise of powers by the political leadership.

¹⁶ (2006) ALL FWLR, (Pt. 332), 1411 at 1422 – 1439.

¹⁷ (1986) 5 NWLR, (Pt. 45), 828.

¹⁸ (1976) 1 MMLR, 169 at 171

¹⁹ (1987) 2 SCNJ, 20 at 22

²⁰ (1998) 3NWLR, (Pt. 540), 143, CA.

- i. It provides the framework for identifying human rights and for protecting those rights.
- j. Law allocates powers and at the same time supervises the exercise of power.
- k. Law promotes happiness for it addresses life and liberty.
- l. Law creates and promotes desirable social values, it symbolically defines normative boundaries within society, clearly delineating the wrong and between fundamentally accepted and unaccepted behaviour.
- m. Law promotes a healthy environment, better work condition and safe products.
- n. Law has practical and mundane functions. It provides a strong structure for and facilitates a broad range of private transactions and productive activities.
- o. Law defines what Constitution, wealth and property, and provides opportunity for acquiring them.
- p. Law identifies and distributes all manner of benefits to qualified citizens.
- q. Law is a mechanism through which society may formally define relationship.

A Critique of Law

It is pertinent to note that law has been characterized as a profoundly negative dimension of human environment as posited by Thomas Cooper in 1830. Both the radical or anarchic version of the critique of law portrays it as an instrument of oppression and exploitation. It is a mechanism that the powerful uses to coerce dominate and intimidate the less powerful and the weak.

The Radical Critique

Here, law is inherently oriented toward the preservation of the status quo. It plays an instrumental role, more specifically in the preservation of private property- and a grossly disproportionate share of the wealth generally in the hands of the few. Law here contributes importantly to the legitimation of hierarchy. Here, law

facilitates plunder and exploitation. Law is violence; it punishes violence and also perpetuates various forms of violence. Law in the negative view is seen as promoting conflict rather than resolving it.

The Conservative Critique

Here, a critique of law is also associated with the school or conservative forces²¹. In the modern era, ultra-conservative forces and the far-right have been especially critical of law being an instrument for achieving a liberal agenda and of its ultimate infringement of individual rights. A central thesis of the right-wing critique of law then highlights the claim that law interferes with the natural freedom citizens are entitled to enjoy, e.g. tax law and gun control law in the United States of America.

The Internal Critique of Law

This criticism comes not only from those who are outsiders, i.e. not legal professionals, but from legal professionals per se who don't see law as an institution, rather on the way it should be used or abused, for example, many have complained about the cost and inefficiencies of the legal system, its imbalances, favouring the privileged, its undemocratic dimensions, its perverted worship of legal reasoning, its use of the best and the brightest minds for non-productive purposes, its frivolous law suits, delaying tactics, lawyer incompetence and so on.

Laws Unfulfilled Promises

The critique of law is not limited to those at the far ends of the ideological spectrum. There is much criticism of the pervasion of law to fulfill the purposes of special interest groups or to improperly implement the law to incur waste of time or money.

By its very nature, law cannot fulfill everyone's expectations and perceptions of justice. One of the paradoxes of living in a society

²¹ Edmond Burke: Criticism of the Legal Order established in the wake of the French Revolution, O' Hagan, 1984, p. 21.

that claims to venerate the rule of law is the production of unrealistic aspirations for what law will accomplish. The passage of the Civil Rights Act²² swept away formal barriers to integration and equal opportunity but could not legislate racism per se out of existence. It could not obliterate deeply embedded social and psychological patterns of behaviour that impeded the realization of equality. Accordingly, there has been much frustration and anger over the gap between the superficial promises of such law and disadvantaged conditions that too many African and Americans and other minority groups have continued to experience. Law has many unfulfilled promises. There are rules and also sections to the rules. Why the rule or proposition may be enjoyed in a particular case by some persons, others suffer the loss of the exceptions to the rule and vice versa.

Hyperlexis – too much law

Other paradoxes pertaining to law often present themselves. If on the one hand we have come to expect law to provide solutions to an exceptionally broad range of social problems and conditions, we also tend to find law overblown and excessively intrusive. The claim that there is too much law is common place. The term ‘hyperlexis’ refers to the excessive growth of law.

By almost any measure, law has indeed been a growth industry in many climes, e.g. America²³. Legislative Bodies from local to federal add more one hundred and fifty thousand (150) new laws to the books each year. More laws mean more law suits and the number of cases filed has led to a widely perceived litigation explosion.

*Thomas Geoghegan*²⁴ argues that the recent litigation explosion can be largely attributed to right-wing approach to law and hyperlexis.

²² Rights Act of 1964 and 1968 in America.

²³ Footlick (1977), Friedman, 2002, Howard 2009.

²⁴ 7 (2007) In See In Court: How the Right made America, a Law Suit.

In Nigeria, we are exposed to many laws, calling for inclusion in our curriculum. Many appear as repetitions. Many new and contemporary areas of law need to be accommodated, hence, too much law. Legal Practitioners in Nigeria delve or branch into many new areas of practice as Solicitor and Advocate as a result of Hyperlexis. Judges are not left out in their adjudication. The society is not static but dynamic with new inventions and technology, coupled with a digital age and call for new areas of law, i.e. too much law. Petroleum law, Aviation law, Energy law, Entrepreneur law, Mediation and Arbitration law and the likes were not common in Nigeria in the 1970s, but they are the norm today.

The Functions of Law

This can be summarized into positive and negative functions.

The positive functions are:

- i. law maintains order
- ii. law settles disputes
- iii. law allows for social catharsis
- iv. law promotes justice

Law's Negative Functions are:

- i. it maintains the status quo
- ii. it divides people
- iii. it exploits people
- iv. it promotes conflicts and violence
- v. it promotes coercion and greed
- vi. it extends state powers.

The Paradox

Whether people are better off or worse off, if they have more law today, are a matter of ongoing dispute²⁵. On the one hand, an

²⁵ 1615 Raph Hamor: A true Discourse of the Present State of Virginia, Richmond, (1957), P. 3.

argument can be put forth that people's rights are more fully protected, harmful activities are more fully addressed and inequalities and injustices are more likely to be corrected with the extension of law.

Argument can on other hand be put forth that law has become too intrusive, that economic inefficiencies and job losses result from excessive litigation, and that the privileged and powerful always have the advantage in the long term when there is more law. While some see trials as more time consuming, others see it as very crucial for a democratic justice system. The sum total is in the society's enduring love – hate relationship with the law which persists.

There are many historical contradictions and cultural sources of ambivalence. The increasingly broad use of law by over zealous prosecutions and career-minded bureaucrats has been characterized as the tyranny of good intentions resulting in a negative impact on personal freedom and the realization of individual justice. Do we rely too much on law (litigation) to address a range of complex social and political phenomena that are simply not amenable to legal resolution? This paradox of wanting both more and less law is a source of conflict in our society today.

Conclusion

It is apposite to conclude that law is a paradox, for it is self-contradictory statement which can only be true if it is false, and vice versa, it is counter intuitive conclusion or outcome. It is claim that two apparently contradictory ideas are true. It is an unanswerable question to difficult puzzle, riddle, an enigma and a quandary. It is a statement which is difficult to believe or which goes against general beliefs, whether in Nigeria, Africa or other climes, it is a paradox which calls for holistic critique. It is infact a myth, and a mystery.